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IN THE
Supreme Court of the United States

JOHN GEDDES LAWRENCE, ET AL.,
Petitioners.
v.
STATE OF TEXAS,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Texas
Fourteenth District

BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a non-profit civil liberties education and legal defense organization. Liberty Counsel has been involved in such matters as *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002), where we successfully defended against an attempt to force Georgia to recognize a Vermont civil union as the legal equivalent to a marriage, *Lofton v. Kearney*, 157 F. Supp.2d 1372 (S.D. Fl. 2001) (currently on appeal to the U.S. Court of Appeals for the 11th Circuit), where we filed an amicus brief on behalf of state legislators in support of the Florida statute that prohibits adoption by same-sex couples, *Brady v. Dean*, 790 A.2d 428 (Vt. 2001), where we challenged the Vermont civil union law on procedural grounds, and *Rosengarten v. Downs*, case no. SC-16836 (Connecticut Supreme Court) where we intervened in an effort to prevent Connecticut from recognizing a Vermont civil union.

SUMMARY OF ARGUMENT

This case has little to do with sodomy laws and everything to do with gaining full acceptance of homosexuality as an incremental step toward achieving the "right to marry, not as a way of adhering to society's moral codes but rather to . . . radically alter an archaic institution."

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[1] Liberty Counsel files this brief with the consent of all parties. The letters granting consent of the parties are attached hereto with the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Michelangelo Signorile, *Bridal Wave*, Out 161 (Dec./Jan. 1994) (www.forthechildreninc.com/issues/homosexuality/TheAgenda/InTheir OwnWords.html).

Prior decisions of this Court establish the right of states to regulate conduct that it deems harmful and immoral, particularly where that conduct conflicts with the idea that marriage is an institution between one man and one woman. Statistical evidence concerning the medical and social harms resulting from "private, consensual" same-sex sexual conduct, together with recent legislative and judicial battles, underscore the long-term, devastating consequences of a decision declaring a fundamental right to engage in private consensual same-sex sodomy. This Court, therefore, should decline Petitioners' invitation to declare privacy rights heretofore unrecognized.

ARGUMENT

I.
CERTIORARI WAS IMPROVIDENTLY GRANTED

There is no evidence in the record for this Court to rule on the questions presented in the cert petition. The record reveals only that Petitioners pled *nolo contendre* to charges that they engaged in "deviate sexual intercourse with another individual of the same sex" in violation of Tex. Pen. Code Ann. § 21.06 (Vernon 1994)[2]; Pet. App.

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[2] "Deviate sexual intercourse" is "any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object." Tex. Pen. Code Ann. § 21.01 (Vernon 1994).

129a; *Lawrence v. Texas*, 41 S.W.3d 349, 350 (Tex. App. 2001) ("circumstances of the offense are not in the record"). There is no evidence that the sexual act (1) was consensual, (2) was not commercial sex, (3) was done in private, out of the view of the public or anyone else present in the room, or that each man had the mental capacity to consent. In addition, there is no evidence that the men are homosexuals, thereby precluding a determination of whether they fall within a suspect class for purposes of the equal protection analysis.[3]

Despite the insufficient record, Petitioners ask this Court to overrule *Bowers v. Hardwick*, 478 U.S. 186 (1986) and recognize a fundamental right to engage in private consensual sodomy. This Court should refrain from deciding such a crucial question when it is unclear that the facts of this case bring the question squarely before the Court. *See Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers Unions v. Denver Milk Producers, Inc.*, 334 U.S. 809 (1948) (per curiam) ("Because of the inadequacy of the record, we decline to uecide the Constitutional issues involved"). Therefore, because this case does not clearly present the facts of same-sex sodomy performed in private between consenting adults, this Court should dismiss the petition as

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[3] As discussed *infra* III.B.3., the fluid nature of sexual orientation prevents identification of a class. Even if such a classification could be made, the mere fact that these two men engaged in a single sexual act together does not establish that they fall within that class.

improvidently granted.

Should this Court decline to dismiss the petition, at best, Petitioners are left with a facial challenge, which means this Court should apply the standard articulated in *U.S. v. Salerno*, 481 U.S. 739, 745 (1987) (a party seeking facial invalidation of a statute "must establish that no set of circumstances exists under which the Act would be valid"). Petitioners concede there are circumstances under which the statute is valid – enforcement against those engaged in public same-sex sodomy, against a man who engages in sodomy with a man unable to consent, or in a context of same-sex prostitution. (Pet. Br. at 6, 39). The Texas law is constitutional under the *Salerno* standard, and therefore should be upheld.

II.
STATES HAVE THE RIGHT TO REGULATE HUMAN SEXUAL RELATIONS

The issue in this case is *not* the persecution of a political minority. It is the right and duty of states to regulate conduct deemed harmful to society. Ruling in Petitioners' favor can only be accomplished by ignoring prior decisions of this Court that refused to find a fundamental right to engage in private consensual sexual conduct.

That the American people remain sharply divided on homosexuality is beyond question. In many states, legislative battles are being fought concerning the scope of rights to be granted to homosexuals (including the right to adopt and marry). Petitioners, however, ask this Court to

halt the ongoing legislative processes by stripping the state legislatures of their authority to regulate acts they deem harmful and immoral. Removing "the ball from the legislators' court", however will not end the debate, it will only prolong "divisiveness" and "defer[] stable settlement of the issue" of homosexual rights. *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1205-08 (1992) (expressing the opinion that this Court's *Roe v. Wade* decision prolonged divisiveness on the abortion issue by halting a political process that was in a state of change). Justice Holmes similarly cautioned that the judiciary should "confine[]" itself to "molecular motions" because "[d]octrinal limbs too swiftly shaped . . . may prove unstable." *Id.* at 1198; *see also Bowers*, 478 U.S. at 194 ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.").

Principles of *stare decisis* dictate that this Court decline Petitioners' invitation to strip states of the right to regulate private consensual sexual conduct that harms individuals and erodes the institution of marriage.

A.
States Have the Right to Promote the Institution of Heterosexual Marriage

Petitioners invite this Court to view the Texas sodomy statute in a vacuum, ignoring the right of states to promote the institution of heterosexual marriage and how the statute falls within that legislative preference.

> [N]o legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family as consisting in and springing from the union for life of *one man* and *one woman* in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilizations.

Murphy v. Ramsey, 114 U.S. 15, 45 (1885) (rejecting constitutional challenge to a federal statute denying franchise in federal territories to those engaged in polygamous cohabitation); George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J. L. & POL'Y 581, 598 (1999) ("Traditional marriage is a public good"). Thus, although involving consenting adults, polygamy is prohibited in all fifty states because it stands in direct conflict with the idea of "family as consisting and springing from the union for life of one man and one woman." Similarly, twenty-four states prohibit adultery.[4] State

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[4] *See* Ala. Code §13A-13-2(c); Ariz. Rev. Stat. Ann. §13-1408; C.R.S.A. §18-6-501; D.C. Code Ann. §22-301; Fla. Stat. Ann. §798.01; Ga. Code. Ann. §16-6-19; Idaho Code §18-6601; 720 Ill. Comp. Stat. Ann. §5/11-7(b); Kan. Stat. Ann. §21-3507(2); Mass. Gen. Laws Ann. ch. 272, §14; Md. Ann. Code Art. 27, §3; Mich. Comp. Laws Ann. §750.30; MSA §609.36; Miss. Code Ann. §97-29-1; N.H. R.S.A. §645:3; N.Y. Pen. L. §255.17; N.C. Gen. Stat. §14-184; N.D. C.C. §12.1-20-09; Okla. Stat. Ann. tit. 21, §872; R.I. Gen. L. §11-6-2; S.C. Code §16-15-60; Utah

regulations legitimately extend beyond the one man, one woman proscription to also prohibit incestuous marriages.[5]

Concomitant with a state's right to promote marriage as the union of one man and one woman – through proscriptions of how many, and which persons may enter into a marital relationship – so too may the states proscribe conduct, including private consensual sexual conduct, that harms individuals and erodes the institution of marriage.

B.
States Have the Right to Regulate Consensual Sexual Conduct

The law "is constantly based on notions of morality, and if all laws representing moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." *Bowers*, 478 U.S. at 196. While governments are "obliged to show equal respect to persons

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Code Ann. §76-7-103(2); Va. Code Ann. §18.2-365; W.Va. Code §61-8-3;Wisc. Stat. Ann. §944.16.

[5] *See, e.g.*, Ala. Code §30-1- 6; Ark. Code Ann. §9-11-106; Colo. Rev. Stat. §18-6-301; Conn. Gen. Stat. Ann. §§46b-21 & 53a-191; D.C. Code Ann. §30-101; Ga. Code Ann. §19-3-3 (1999); Kan. Stat. Ann. §21-3603; Md. Code Ann. Fam. Law §2-202; Mass. Gen. Laws Ann. ch. 207, §§1-2; Mich. Comp. Laws Ann. §551.4; Miss. Code Ann. §§93-1-1 & 97-29-5; Mo. Rev. Stat. §568.020; Mont. Code Ann. § 45-5-507; N.H. Rev. Stat. Ann. §639:2; Okla. Stat. Ann. tit. 43, §2 ; Okla. Stat. Ann. tit. 21 §885; Or. Rev. Stat. §163.525; R.I. Gen. Laws §§15-1-1 to 2; S.C. Code Ann. §20-1-10; S.D. Codified Laws §25-1-7; Tenn. Code Ann. §36-3-101.

qua persons" they are not obliged to show equal respect "to all of the persons' acts and choices." Robert P. George, MAKING MEN MORAL 102 (1993); *see also* Dent, *supra*, at 586 (government may promote or discourage conduct because it believes that the conduct benefits or harms the individual, even if the individual does not agree). Prohibiting behavior deemed unacceptable or immoral is precisely what law does: it limits one's freedom to act in ways that cause harm to the individual or to society.

States are justified in enforcing a societal morality as a means of self-preservation because "social bonds constituted by shared moral beliefs are placed in peril when the law tolerates actions that are generally considered to be wicked." George, *supra*, at 51-52, 73; *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 575 (1991) ("all human societies have prohibited certain activities not because they harm others but because they are considered immoral"). "Without morality, the foundations of our liberty will crumble, because there will be no moral compass differentiating between right and wrong." Stephen Daniels, *Intolerant Tolerance: The Weapon of Moral Relativism* at 4 (available at www.ncfpc.org/policypapers.html); *see also* George, *supra*, at 36-37 ("Perhaps every generation must learn for itself that 'private' immoralities have public consequences. . . . It is plain that moral decay has profoundly damaged the morally valuable institutions of marriage and the family, and has, indeed, largely undercut the understandings of the human person, marriage, and the family").[6]

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[6] In a study published in 1932, Joseph Daniel Unwin demonstrated, through the results of 7 years of research on 80

The "strength of our system" of American federalism is that it "leave[s] room for substantial variation of moral visions and legal regimes among states . . . ." Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973, 974 (Jan. 2002). Moral visions of the various states have led to laws criminalizing fornication (sexual relations between unmarried persons), bestiality (sexual relations with animals), necrophilia (sexual relations with dead bodies), adult-minor consensual sexual relations, consensual adult incestuous sexual relations, and in several states, including Texas, sodomy.

> There has never been any doubt that the legislature, in the exercise of its police power, has authority to criminalize the commission of acts which, without regard to the infliction of any other injury, are considered immoral. Simply put, commission of what the legislature determines as an immoral act, even if consensual and private, is an injury against society itself.

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primitive tribes and on ancient and modern civilizations, that there is a "close relationship between sexual opportunity and cultural condition" – namely, that with no exception, restrictions placed on sexual opportunity outside a monogamous relationship produce the "expansive energy" necessary for the civilization to prosper and strengthen. Joseph Daniel Unwin, SEXUAL REGULATIONS AND CULTURAL BEHAVIOR 5, 30-32 (1932) ("'civilization' has been built up by sacrifices in the gratification of innate desires").

State v. Smith, 766 So.2d 501, 509 (La. 2000). Although Petitioners and their amici rely heavily on *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Roe v. Wade*, 410 U.S. 113 (1973), *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) and *Stanley v. Georgia*, 394 U.S. 557 (1969) as authority for a fundamental right to engage in private consensual sexual conduct, the cases do not stand for that proposition. *See Carey*, 431 U.S. at 685 (explaining that *Roe* and *Eisenstadt* address the right to be free of unwarranted governmental intrusion into the fundamental decision of whether to beget or bear a child) & at 702, 705 (White, J. concurring) (explaining that the decision in *Carey* did not declare "unconstitutional any state law forbidding extramarital sexual relations" or "require state legislation to meet the 'compelling state interest' standard whenever it implicates sexual freedom"); *Bowers*, 478 U.S. at 191 ("any claim that these cases [*Carey, Roe, Eisenstadt, Griswold*] nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable"); *Griswold*, 381 U.S. at 485 (invalidating statute that swept "unnecessarily broadly" – government attempted to control distribution of birth control through regulation of use rather than of manufacture or sale); *Stanley*, 394 U.S. at 565 (finding unconstitutional a statute that prohibited mere possession in the home, for private viewing, of obscene materials, this Court emphasized that "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds").

Far from recognizing a fundamental right to engage in private consensual sexual conduct, this Court has

repeatedly emphasized that putting conduct between consenting adults "beyond state regulations, is a step [it is] unable to take." *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 68 (1973). This Court again should decline to deprive states of the power to enact statutes that proscribe harmful and immoral conduct.

An overriding theme in Petitioners' brief is that same-sex sexual activities are victimless and therefore beyond the legitimate reach of legislative proscription. (Pet. Br. at 28). Statistical evidence (much of which is published in leading homosexual magazines and newspapers) demonstrates, however, that those who engage in homosexual conduct are at increased risk for numerous diseases as compared to heterosexuals. Statistically, sexual promiscuity is increased among those who engage in homosexual conduct, the result of which is the wide-spread presence of diseases found predominantly, if not exclusively, among those who engage in homosexual conduct.

A far-ranging study published in 1978 revealed that 75% of self-identified, white, gay men, admitted to having sex with more than 100 different males in their lifetime, with 28% claiming more than 1,000 lifetime male sex partners. Alan P. Bell and Marin S. Weinberg, HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN 308, Table 7 (1978). A study published in 1997 produced similar results: of 2,583 homosexuals, only 2.7 percent claimed to have had sex with one partner only; the most common response, given by 21.6 percent of the respondents, was of having 101 to 500 lifetime sex partners. Paul Van de Ven *et al.*, *A Comparative Demographic and*

Sexual Profile of Older Homosexually Active Men, J. SEX RESEARCH 34 (1997). The U.S. Centers for Disease Control similarly reported an upswing in promiscuity in San Francisco: from 1994 to 1997, the percentage of homosexual men reporting multiple partners and unprotected anal sex rose from 23.6 percent to 33.3 percent, with the largest increase among men under 25. *See* John R. Diggs, Jr., M.D., *The Health Risks of Gay Sex* (available at www.corporateresourcecouncil.org) (citing *Increases in Unsafe Sex and Rectal Gonorrhea among Men Who Have Sex With Men – San Francisco, California, 1994-1997*, MORTALITY AND MORBIDITY WEEKLY REPORT, CDC, 48(3): 45-48, p. 45 (Jan. 29, 1999)); *see also* Erica Goode, *With Fears Fading, More Gays Spurn Old Preventive Message*, NEW YORK TIMES, August 19, 2001 (in the past seven years, while the practice of anal sex had increased, with multi-partner sex doubling, condom use had declined 20 percent). A 1994 survey of 2500 homosexual men published in the August 23, 1994 issue of THE ADVOCATE revealed that in the past five years 48% of the men had engaged in "three-way sex" and 24% had engaged in "group sex (four or more)." www.forthechildreninc.com/issues/homosexuality/TheAgenda/InTheirOwnWords.html.

A long-term monogamous relationship also has a different meaning among those who engage in homosexual conduct. "Gay magazines are . . . celebrating the bigger bang of sex with strangers or proposing 'monogamy without fidelity' – the latest Orwellian formulation to excuse having your cake and eating it too." Camille Paglia, *I'll Take Religion Over Gay Culture*, Salon.com online magazine, June 1998 (available at www.frontpagemag.com/archives/guest_column/paglia/gayculture.htm). Another author

praises gay male couples for realizing that sexual fidelity is not necessary to show their love for each other and advocates that gay male couples can "provide models and materials for rethinking family life and improving family law." Richard D. Mohr, *In The Case for Gay Marriage*, 9 NOTRE DAME J. L. ETHICS & PUB. POL'Y 215, 233 (1995). A recent study reveals that although 46% of gay men attending "circuit parties" claimed to have a "primary partner", 27% of those men "had multiple sex partners (oral or anal) during their most recent circuit party weekend . . . ." Gordon Mansergh, Grant Colfax, *et al.*, *The Circuit Party Men's Health Survey Findings and Implications for Gay and Bisexual Men*, AM. J. OF PUB. HEALTH 91(6): 953-58 (June 2001).

Given these staggering statistics of sexual promiscuity, the number of diseases that are found predominantly (and in some instances, exclusively) among homosexual practitioners comes as no surprise. Although nearly 64% of men with AIDS were men who have had sex with men, *Basic Statistics*, CDC DIVISION OF HIV/AIDS PREVENTION, June 2001 (available at www.cdc.gov/hiv/stats.htm), the list of diseases found with higher incidence among those engaged in homosexual conduct does not stop there. "Reports at a national conference about sexually transmitted diseases indicate that gay men are in the highest risk group for several of the most serious diseases." Bill Roundy, *STD Rates on the Rise*, NEW YORK BLADE NEWS 1, Dec. 15, 2000 ("the increased number of sexually transmitted diseases (STD) cases is the result of an increase in risky sexual practices by a growing number of gay men who believe HIV is no longer a life-threatening illness"); *see also* Jon Garbo, *Gay and Bi Men Less Likely*

to Disclose They Have HIV, GAYHEALTH NEWS, July 18, 2000 (researchers from the University of California, San Francisco found that 36% of homosexuals engaging in unprotected oral, anal or vaginal sex failed to disclose that they were HIV positive to casual sex partners) (available at www.gayhealth.com/templates/0/news?record=136).

The list of diseases found with extraordinary frequency among male homosexual practitioners as a result of anal sex include: anal cancer, chlamydia trachomatis, cryptosporidium, giardia lablia, herpes simplex virus, HIV, HPV, isospora belli, microsporidia, gonorrhea, viral hepatitis types B & C, syphilis. John R. Diggs, Jr., M.D., *The Health Risks of GaySex* 3 (available at www.corporateresourcecouncil.org). "*Sexual transmission of some of these diseases is so rare in the exclusively heterosexual population as to be virtually unknown.*" *Id.* at 3 (emphasis added). Another disease found almost exclusively among homosexual practitioners is "Gay Bowel Syndrome" – "sexually transmitted gastrointestinal syndromes." *STD Treatment Guidelines: Proctitis, Proctocolitis, and Enteritis*, (Centers for Disease Control and Prevention 1993) (available at www.ama-assn.org/special/std/treatmnt/guide/stdg3470.htm); *see also* Jack Morin, ANAL PLEASURE AND HEALTH: A GUIDE FOR MEN AND WOMEN 22 (1998) (explaining that homosexual sexual activities "provide many opportunities for tiny amounts of contaminated feces to find their way into the mouth of the sexual partner . . . the most direct route is oral-anal contact").

As for the diseases that are also found among heterosexuals, individuals engaged in homosexual conduct

constitute the largest percentage of many of those diseases, including anal cancer, HIV, HPV (a collection of viruses that can cause warts, or papillomas, on various body parts) and syphilis. For example, 85% of the syphilis cases reported in the Seattle area of Washington in 1999 were among self-identified homosexual practitioners. Diggs, *supra*, at 3-4. Syphilis among male homosexual practitioners is at epidemic levels in San Francisco. *Id.* HPV also is "almost universal" among those men. Bill Roundy, *STDs Up Among Gay Men: CDC Says Rise is Due to HIV Misperceptions*, THE WASHINGTON BLADE, Dec. 8, 2000 (available at www.washblade.com/health/a). While the incidence of anal cancer in the United States is only .9/100,000, the number soars to 35/100,000 for those engaged in homosexual conduct. Bob Roehr, *Anal Cancer and You*, BETWEEN THE LINES, Nov. 16, 2000 (available at www.pridesource.com/cgibin/article? article=3835560).

Lesbians are also at increased risk for certain diseases, including cancer, hepatitis C, and bacteria vaginosis, predominantly because they are "significantly more likely to report past sexual contact with a homosexual or bisexual man and sexual contact with an IDU (intravenous drug user)." Katherine Fethers *et al.*, *Sexually Transmitted Infections and Risk Behaviors in Women Who Have Sex with Women*, SEXUALLY TRANSMITTED INFECTIONS 345-47. Although rare, a Philadelphia woman recently tested positive for HIV as a result of "shared sex toys" with her HIV-positive bisexual female partner. *See* www.advocate.com/new_news.asp?ID=7628&sd=01/31/03.

As these statistics reveal, the Texas same-sex sodomy statute is a legitimate exercise of its police power.

III.
DEREGULATING HUMAN SEXUAL RELATIONS WILL ERODE THE INSTITUTION OF MARRIAGE

"Being queer means pushing the parameters of sex, sexuality, and family, and in the process, transforming the very fabric of society. . . . We must keep our eyes on the goals of providing true alternatives to marriage and of radically reordering society's views of family." Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, OUT/LOOK National Gay and Lesbian Quarterly (Fall 1989); *see also* Michelangelo Signorile, *Bridal Wave*, OUT 161 (Dec./Jan. 1994) ("the most subversive action lesbians and gay men can undertake – and one that would perhaps benefit all of society – is to transform the notion of 'family' entirely").[7] There can be no doubt that a ruling which finds

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[7] The homosexual groups have significant resources to advance their agenda. *See* Paul E. Rondeau, *Homosexuality: Truth Be Told*, 14 REGENT U. L. REV. 443, 468-70 (2001-2002): *Human Rights Campaign*, the largest national homosexual lobby in the nation, claiming over 400,000 members, reports income over $16 million; *Gay and Lesbian Alliance Against Defamation* (GLAAD) is the dominant media relations and watchdog lobby of the homosexual movement with income of $4,199,134; *National Gay and Lesbian Task Force* (NGLTF) with income in excess of $3.5 million; *PFLAG*, with income of just under $1.5 million, claims membership of 76,000 with 425 local groups, promotes the idea that ignorance of homosexuality has bred a climate of torment, fear and hatred in our schools; *GLSEN* with income exceeding $1.8 million states that their mission is to fight the homophobia and heterosexism that undermine healthy school climates; *Lambda Legal Defense and Education Fund* reports income over $10,000,000.

a fundamental right to engage in private consensual sodomy will be yielded as a weapon in ongoing and future legislative and legal battles seeking special protections based on one's actual or perceived sexual orientation, as well as repeal of laws that prohibit adoption and marriage by same-sex couples. A state has a legitimate interest in preventing such an attack on the family and the institution of marriage.

A.
The Abolition of Marriage as the Union of One Man and One Woman

Marshall Kirk and Hunter Madsen articulated an elaborate strategy for achieving acceptance of gay sexuality, and ultimately of entirely transforming the notion of family. "In any campaign to win over the public, gays must be portrayed as victims in need of protection so that straights will be inclined by reflex to adopt the role of protector." AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR & HATRED OF GAYS IN THE 90'S 184. Ads should feature gays as "icons of normality." *Id.* "[I]t makes no difference that the ads are lies; not to us, because we're using them to ethically good effect . . . ." *Id.* at 154. We must plan to "desensitize straights to gays and gayness . . . ." *Id.* at 149.

> [F]irst, you get your foot in the door, by being as similar as possible; then, and only then – when your one little difference is finally accepted – can you start dragging in your other peculiarities, one by one. You hammer in the wedge narrow end first. . . . In time, as hostilities subside and stereotypes

> weaken, we see no reason why more and more diversity should not be introduced in the projected image [of gays]. This would be healthy for society as well as for gays.

Id. at 146, 186-76. This "desensitization" process is part of the strategy leading up to "conversion."

> [B]y Conversion, we actually mean something far more profoundly threatening to the American Way of Life, without which no truly sweeping social change can occur. We mean conversion of the average American's emotions, mind, and will, through a planned psychological attack, in the form of propaganda fed to the nation via the media. We mean 'subverting' the mechanism of prejudice to our own ends – using the very processes that made Americans hate us to turn their hatred into warm regard – whether they like it or not. . . . [G]ays can undermine the moral authority of homohating churches over less fervent adherents by portraying . . . [them] as antiquated backwaters, badly out of step . . . with the latest findings of psychology.

Id. at 153-54, 179.

Although written in 1987 as a *satirical* piece to mock religious foes of homosexuality, the *Homosexual Manifesto* (which was first published in GAY COMMUNITY NEWS, Feb. 15-21, 1987) is at the same time shocking in its

assertions while revealing for its similarities to the political agenda advanced today by homosexual groups. (Text of the essay is available at http://libercratic.government.direct nic.com/Journal/social/queer/homosexual_agenda.htm).

> We shall sodomize your sons, emblems of your feeble masculinity, of your shallow dreams and vulgar lies. We shall seduce them in your schools . . . in your seminaries, in your youth groups, in your movie theater bathrooms . . . in your houses of Congress, wherever men are with men together. . . . All laws banning homosexual activity will be revoked. Instead, legislation shall be passed which engenders love between men. . . . There will be no compromises. We are not middle-class weaklings. . . . Those who oppose us will be exiled. . . . The family unit, which only dampens imagination and curbs free will, must be eliminated. . . . All churches who condemn us will be closed.

Id.; *cf.* David Thorstad, "ManBoy Love and the American Gay Movement," in *Male Intergenerational Intimacy: Historical, Socio-Psychological, and Legal Perspectives*, J. OF HOMOSEXUALITY 20:1-2, 255 (1990) (the "ultimate goal" is "not just equal rights for 'lesbians and gay men,' but also freedom of sexual expression for young people and children").

Like the "agenda" set forth in the "Homosexual Manifesto", current legal battles include (1) lowering the age of consent to engage in sexual conduct with adults, (2)

silencing public and private expression of opposition to the homosexual agenda, (3) repeal of State Defense of Marriage Laws (DOMAs), which refuse to grant full faith and credit to same-sex marriages entered into in other states, (4) attack of state laws that grant married spouses a right not granted to unmarried same-sex partners, (5) invalidation of state laws prohibiting adoption by same-sex couples, and (6) repeal of sodomy statutes.

It takes no stretch of the imagination to envision the consequences stemming from a recognition by this Court that there is a fundamental right to engage in private consensual same-sex sodomy. Two examples show how incremental extension of rights and benefits to those engaged in homosexual conduct lead to results that are far reaching and disastrous.

In 1999, the Vermont Supreme Court declared that same-sex couples were entitled to the same benefits and protections as married couples and mandated that the legislature enact laws to provide those benefits and protections. *See Baker v. State*, 744 A.2d 864 (Vt. 1999). Some of the reasons relied upon by the court included that (a) "Sexual Orientation is among the categories specifically protected against hate-motivated crimes in Vermont," thus belying the fact that the state frowns upon same-sex marriages, *id.*, (b) Vermont had enacted statewide legislation prohibiting discrimination on the basis of sexual orientation, and (c) Vermont had removed barriers to adoption by same-sex couples as well as extending legal rights and protections to couples who dissolve their "domestic relationship." *Id.* at 885-86. It was the incremental steps the State of Vermont took over the years

that led the Vermont Supreme Court to conclude that the state had abandoned its longstanding disapproval of same-sex relationships and therefore, that there existed no barrier to the extension of marriage benefits to same-sex couples.

The paper given by Kees Waaldjik, a professor who wrote the Netherland's same-sex-marriage bill, also demonstrates how incremental steps led to the Dutch same-sex marriage bill[8] and ultimately full mandated acceptance of homosexual relationships.

> Legislative recognition of homosexuality starts with decriminalization, followed or sometimes accompanied by the setting of an equal age of consent, after which anti-discrimination legislation can be introduced, before the process is finished with legislation recognizing same-sex partnership and parenting.
>
> The "law of standard sequences" implies . . . that . . . each step seems to operate as a stimulating factor for the next step. For example, once a legislature has enacted that it is wrong to treat someone differently because of his or her homosexual orientation, it becomes all the more suspect that the same legislature is preserving rules

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[8] *See* The "Law of Small Change": How the Road to Same-Sex Marriage Got Paved in the Netherlands by Kees Waaldjik (Faculty of Law, Universiteit Leiden, the Netherlands) 19 June 1999. Netherlands passed the bill in 2001.

of family law that do precisely that.

He then goes on to explain the "extremely gradual and almost perversely nuanced (but highly successful) process of legislative recognition of same sex partnership in the Netherlands."

> Since the 1970's and 1980's Dutch cohabiting couples have increasingly been given similar legal rights and duties as married couples. One after the other changes were introduced in rent law, in social security and income tax, in the rules on immigration, state pensions, and death duties, and in many other fields. And in none of these fields any distinction was made between heterosexual and homosexual cohabitation. There was never a 'law on same-sex cohabitation.' All recognition was given in the context of a more general overhaul of the rules of a specific field. Simultaneously cohabitation contracts and partner testaments became common, and were fully recognized by the courts. This evolution was more or less completed when it was made illegal for any employer and for any provider of goods or services, to distinguish between married and unmarried couples.
>
> * * *
>
> In the 1970's fostering became a possibility for gay and lesbian and other unmarried couples. Having a homosexual orientation

> or relationship stopped being a bar to keeping (access to) your children after a divorce. And the newer form of de facto parenting by same sex couples, artificial insemination by women in lesbian relationships was never banned in the Netherlands. . . . On 1 January 1998 legislation came into force making joint authority [over children] also available to same sex couples.
>
> * * *
>
> So what to mankind, and to all its representatives at this conference, may seem a giant step - the opening up of the institution of marriage to same-sex couples - will, for the Dutch, only be another small change.

Waaldjik's paper reveals that changes in the law tend to happen at a slow, incremental pace. This Court, therefore, must keep in mind that this case is not just about invalidating sodomy laws, it is about the goal of homosexuals to enter into the "clubhouse" of family and marriage as it currently exists so as to "radically alter" that institution. Signorile, *supra*, at 161. Recognition of a fundamental right to engage in private consensual sodomy is an incremental step toward disintegration of traditional family and marriage that should not be taken by this Court.

B.
Current Strategies to Redefine Sexuality and Marriage

1.
Our Youth

Recognizing that "[w]hoever captures the kids owns the future", Patricia Nell Warren, *Future Shock*, THE ADVOCATE 80 (Oct. 3, 1995), homosexual groups developed strategies to teach our youth that exploration of one's homosexual tendencies is healthy and normal. For example, Outright Vermont explains in a 2000 report (available at www.starsinc.org/outright.html) that its "target population" is youth between ages 14 & 22 and provides highlights of its *government-funded* activities held for public school students throughout the year, including (1) "Safer Sex Parties", the goal of which were to provide "[f]un exploration of sexuality & safer sex activities including demonstrations, guided practice & skill evaluation for barrier use"; (2) social events, where "[b]arriers & other safe sex supplies were available at the door & in the bathroom"; (3) "weekend retreats" where "[a]ll retreat participants practiced & were evaluated on their barrier use skills & were given a variety of barriers to take home; and (4) training in proper needle-cleaning techniques for those using hormones to alter gender characteristics.

GLSEN (Gay, Lesbian and Straight Education Network) has a guide designed to be used in public schools to eradicate institutionalized heterosexism. In determining whether institutional heterosexism exists, the authors ask such questions as: "Are gender-specific bathrooms and locker rooms the only option in your school?", "Do proms,

homecoming and athletic events have exclusive votes for 'kings' and 'queens'"? (available at www.glsen.org/templates/resources/record.html?section=18&record=1313).

PFLAG's (Parents, Families & Friends of Lesbians and Gays) brochure entitled "Be Yourself: Questions and Answers for Gay, Lesbian, Bisexual and Transgender Youth" (pflag.org/publications/BeYourself.pdf), contains recommended reading that encourages exploration of one's homosexual feelings at an early age. *See, e.g.*, Linnea Due, JOINING THE TRIBE: GROWING UP GAY & LESBIAN IN THE '90S 111 (1995) ("My first experience was with a much older man . . . . When I was fifteen, he must have been twenty-nine, thirty . . . I seduced him . . . It was a wild night"); Amy Sonnie, REVOLUTIONARY VOICES: A MULTICULTURAL QUEER YOUTH ANTHOLOGY 167 (2000) ("My sexuality is as fluid, infinite, undefinable, and ever-changing as the north-flowing river. . . . Sexuality is not black or white . . . it is gray . . . ."); Ann Heron, TWO TEENAGERS IN TWENTY: WRITINGS OF GAY AND LESBIAN YOUTH 134, 167, 171 (1995) ("I had been having sex with a man since I was fourteen"; "For gay liberation to have any value for youth, people must be reminded, preferably in fifth- or sixth-grade sex education classes, that gay is not only good, but probably a part of most sexual make-ups").

PLFAG also explains that "[b]eing GLBT [*i.e.* gay, lesbian, bisexual or transgender] is as much a human variation as being left-handed . . . . One or two sexual experiences with someone of the same sex may not mean you're gay . . . GLBT people have some sexual experiences with the opposite gender. . . . Your school years are a time of figuring out what works for you, and crushes and

experimentation are often part of that." "Be Yourself" at 4-5.

Not content with indoctrinating our youth with the message that homosexual conduct is as healthy and normal as heterosexual conduct, and that anyone who speaks out against homosexuality is "intolerant", *see* Stephen Daniels, *Intolerant Tolerance: The Weapon of Moral Relativism* 2 (available at www.ncfpc.org/policypapers.html), homosexual groups also are challenging traditional notions of family and morality through legislative and judicial attacks.

2.
The legislature and judiciary

The battlefield is ever growing. In most states, homosexuals are seeking rights previously not granted to them. They include the right to marry, the right to adopt, to abolish sodomy laws, to obtain for their partners' employee benefits provided to spouses of employees, to amend state and city discrimination laws to specifically prohibit discrimination based on a persons actual or *perceived* sexual orientation or gender identity and to add sexual orientation to Hate Crimes laws.[9] Transgendered persons are similarly

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[9] *E.g., Lewis et al. v. Harris et al.* (Sup. Ct. of N.J., Chanc. Div. Hudson Co.) (filed 2002) (7 couples seeking right to marry); *Lofton v. Kearney*, 157 F. Supp.2d 1372 (S.D. Fla. 2001) (seeking to invalidate Florida statute prohibiting adoption by same-sex couples); www.hrc.org/worknet/dp/index.asp & Glen E. Lavy, BEHIND THE RHETORIC: THE SOCIAL GOALS OF GLBT ADVOCACY IN CORPORATE AMERICA (www.corporateresourcecouncil.org)

seeking nondiscrimination laws, including the right to use restrooms that correspond to the gender they perceive themselves to be, not according to their actual gender.[10] Some cities have passed, or are attempting to pass statutes that require all entities contracting with the city to provide benefits to partners of same-sex employees on the same basis as they provide them to spouses of employees, irrespective of any religious objections to providing such benefits.[11] A ruling in this case that overturns *Bowers* and finds that there is a fundamental right to engage in private consensual sexual conduct will be used as a sword in these ongoing, and in the future, legislative and judicial battles.

3.
Sexual preference is a non-existent class

A ruling that the state must have a compelling

(each discussing the efforts to gain employee benefits); www.hrc.org/newsreleases/2003/030205hatecrimes.asp (Cincinnati adds sexual orientation to hate crimes law, despite FBI crime statistics showing bias crimes as a result of race and religion far exceed those based on sexual orientation, www.fbi.gov/ucr/ucr.htm).

[10] *See* www.ntac.org/pr/release.asp?did=21 (restrooms); www.hrc.org/issues/transgender/010327highlights.asp (recent transgendered efforts by HRC); www.ci.boulder.co.us/cao/brc/121.html (Boulder ordinance prohibiting employment discrimination based on actual or perceived gender identity).

[11] *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461 (9th Cir. 2001) (ordinance upheld); www.council.nyc.us/textiles/Int%2002722002.htm (NYC bill introduced).

interest to justify the disparate treatment of homosexual and heterosexual sexual conduct will not only undermine a state's right to proscribe conduct that erodes the institution of traditional marriage, but also is particularly inappropriate where, as here, there is a growing body of academic literature explaining that one's sexual orientation is fluid and ever-changing. *See, e.g.*, Naomi Mezey, *Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts*, 10 BERKELEY WOMEN'S L. J. 98-109 (1995) (sexual orientation is "not fixed, but change[s] over time"; categories of heterosexual and homosexual "are rhetorical. . . because of a disjuncture between the concepts of homosexual and heterosexual and the sexual acts they claim to signify"); Andrew Sullivan, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 151-54 (1995) (for purposes of discrimination laws, race is different than sexual orientation because sexual orientation can be hidden and is a complex "mixture of identity and behavior").

The growing frequency at which lesbians are entering into relationships with men confirms this fluidity. The "phenomenom" is becoming so commonplace that the term "hasbian" – "a woman who used to date women but now dates men" – has been introduced into the homosexual community. Amy Sohn, "Bi for Now", NewYork Metro.com. Widely-known examples include Anne Heche (movie actress) ending her relationship with Ellen DeGeneres to marry a man. Sinead O'Connor (Irish singer) declaring herself a lesbian, yet in 2001 marrying a man. Julie Cypher (partner of Melissa Etheridge) left their relationship by declaring that she was never a lesbian. A 2000 survey in Australia similarly found that 19 percent of

gay men reported having sex with a woman in the six months prior to the survey. Julie Robotham, *Safe Sex by Arrangement as Gay Men Reject Condoms*, THE SYDNEY MORNING HERALD (June 7, 2001).

There also is no scientific evidence that homosexuality is genetic, and therefore, immutable. *See* Michael Bronski, *Blinded by Science*, THE ADVOCATE, Feb. 1, 2000, 64 (Dr. Edward Stein explains that "there are serious problems with the science" claiming a biological origin to homosexuality). Significantly, Dr. Robert Spitzer, one of the men who helped change the American Psychiatric Association's opinion on treating homosexuality as a mental disorder, recently acknowledged that homosexuals can become heterosexual. Pete Winn, *A Crack in the Wall? A Respected Psychiatrist Rethinks Homosexuality*, CITIZENLINK: FAMILY ISSUES IN POLICY AND CULTURE (Feb. 21, 2000) ("I'm personally convinced that many of these individuals have maintained and made major changes in their sexual orientation") (available at www.family.org/cforum/hotissues/a0009548.html); Dr. Warren Throckmorton, *Initial Empirical and Clinical Findings Concerning the Change Process for Ex-Gays*, PROFESSIONAL PSYCHOLOGY, RESEARCH AND PRACTICE (June 2002) ("sexual orientation, once thought to be an unchanging sexual trait, is actually quite flexible for many people, changing as a result of therapy for some, ministry for others and spontaneously for still others").

Fluidity of one's sexual orientation, and the lack of any evidence establishing its immutability, precludes defining a class based on sexual preference.

IV.
CONCLUSION

For the foregoing reasons, the decision of the Texas Court of Appeals for the Fourteenth District should be affirmed.

Respectfully Submitted,

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